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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JAMES FRANKLIN FUNDERBURK, Defendant and Appellant.	C041713 (Super. Ct. No. CR013460)

Defendant James Franklin Funderburk appeals after he was convicted of sale of cocaine base. He argues the court should have instructed the jury on the included crime of possession of cocaine base, and the court erred by refusing his proffered instruction to the effect that a copurchaser of drugs may not also be convicted of selling those drugs to other copurchasers. For the reasons stated below, we conclude these contentions lack merit and therefore affirm the judgment.

BACKGROUND

Defendant was arrested as a result of an undercover narcotics purchasing operation in West Sacramento. On June 18,

2001, Andrew Scott of the Placer County Sheriff's Department was working with Yolo County officers trying to purchase narcotics. Scott was approached by John Blay at the Casa Mobile Home Park. Scott told Blay he wanted to buy $20 worth of rock cocaine. After Blay agreed to help, Scott was escorted to the Welcome Grove Lodge, where Blay tried to buy rock cocaine with $20 Scott gave to him. After failing to make a purchase, Blay and Scott returned to the Casa Mobile Home Park, where Blay met with defendant and explained the situation. Defendant informed Blay that "crack" was indeed available at the Welcome Grove Lodge. Defendant accompanied Blay and Scott upon their return to the Welcome Grove Lodge and offered to assist in the purchase in exchange for a portion of the drugs. Blay handed defendant the $20 bill Scott had given him, and defendant disappeared into the Welcome Grove Lodge but returned without any drugs. Defendant then walked to 820 West Capitol Avenue, where he purchased .36 gram of rock cocaine from a man sitting on the porch.

Defendant handed the rock to Blay, who chipped off a piece before handing it to Scott. Defendant looked at Scott and held his hand out. Scott told Blay to give defendant some of the piece he had chipped off the rock. After Scott left the scene, defendant was arrested. He had a cocaine pipe in his possession but no narcotics. Defendant was subsequently tested for drugs and found to have a cocaine metabolite in his system.

Based on these facts, defendant was charged by information with a violation of Health and Safety Code section 11352, subdivision (a) (section 11352(a)), "in that [defendant] did

willfully and unlawfully sell a controlled substance, to wit, cocaine base."

Prior to submission of the case to the jury, defendant did not request an instruction on the offense of simple possession of cocaine base, nor did the court so instruct. The court refused an instruction proposed by the defense (hereafter, the proffered instruction) that defendant was not guilty of selling or furnishing cocaine base if he were found to be a mere copurchaser of the drugs he procured.[1] The court rejected the proffered instruction because there was insufficient evidence to support it.

The jury convicted defendant as set forth in the information. Defendant was sentenced to the midterm of four years in prison. The court thereafter found defendant was addicted to or in imminent danger of addiction to cocaine,

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[1] The proffered instruction stated: "Co-purchasers of controlled substances are not guilty of selling/furnishing controlled substances to one another, where the individuals involved are truly copartners in the purchase and the purchase is made strictly for each's personal use. (*People v. Edwards* (1985) 39 Cal.3d 107.) [¶] Where one of the co-purchasers takes a more active role in instigating, financing, arranging, or carrying-out the drug transaction, the 'partnership' is not an equal one and the more active 'partner' may be guilty of furnishing to the less active one. Further, one who acts as a go-between or agent of either the buyer or seller may be found guilty of furnishing as an aider and abettor to the seller. [¶] However, because one who merely purchases drugs is not guilty of furnishing as an aider and abettor of the seller, an equal partner in a co-purchase cannot be found guilty of furnishing to his co-purchaser on a theory that he aided and abetted the actual seller. (*Ibid* [*sic*] at 114.)"

suspended criminal proceedings, and committed defendant to the California Rehabilitation Center. (Welf. & Inst. Code, § 3051.) Defendant appealed. (Pen. Code, § 1237, subd. (a).)

DISCUSSION

Defendant argues his conviction for sale of cocaine base must be reversed because the court failed to instruct, sua sponte, on the necessarily included offense of simple possession of cocaine base. In a related argument, defendant contends the court erred by refusing his instruction that he was not guilty of selling or furnishing cocaine base if he were a mere copurchaser of the drugs. We consider these contentions in turn.

We begin with the premise that the court is required to instruct, even in the absence of a request therefor, on elements of the offense and all necessarily included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) The key issue here is whether the offense of simple possession of cocaine base is necessarily included in the offense of sale of cocaine base.

"'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.'" (*People v. Pearson* (1986) 42 Cal.3d 351, 355, quoting *People v. Greer* (1947) 30 Cal.2d 589, 596.) "The determination of whether an offense cannot be committed without necessarily committing the included offense must be based, however, upon the statutory definitions of both

offenses and the language of the accusatory pleading," without consideration of the evidence in support of the conviction. (*People v. Ortega* (1998) 19 Cal.4th 686, 698; *People v. King* (2000) 81 Cal.App.4th 472, 475.)

At the time defendant committed the offense herein, section 11352(a) provided: "[E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away . . . [specified controlled substances, including cocaine base] . . . shall be punished by imprisonment in the state prison for three, four, or five years."

This definition does not require the People to prove defendant was in actual or constructive possession of the controlled substance in order to prove a violation of Health and Safety Code section 11352. In *People v. Rogers* (1971) 5 Cal.3d 129, the defendant contended that acquittal of a charge of possession of narcotics precluded a conviction for transportation of narcotics. (*Id.* at p. 131.) The court rejected the argument, stating: "Although possession [which the court had observed could be either actual or constructive] is commonly a circumstance tending to prove transportation, [fn. omitted] it is not an essential element of that offense and one may 'transport' marijuana or other drugs even though they are in the exclusive possession of another." (*Id.* at p. 134.) By parity of reasoning, the People need not prove possession in order to obtain a conviction for sale of narcotics. *(People v.*

Peregrina-Larios (1994) 22 Cal.App.4th 1522, 1524.) Since the greater offense (sale of rock cocaine) may be committed without committing the lesser offense (possession of rock cocaine), possession of rock cocaine is not a lesser included offense of sale of rock cocaine under the "elements test."

The "accusatory pleading" test also fails to assist defendant since the language of the information does not encompass the element of possession.[2]

It follows that the crime of possession of cocaine base was not a necessarily included offense in the sale of same, and the court did not err by failing to instruct on its own motion. At best, the crime of simple possession of cocaine base was a lesser *related* offense, for which there is no entitlement to instruction. (*People v. Birks* (1998) 19 Cal.4th 108, 136.)

Defendant attempts to circumvent this rule by arguing the facts of this case show that he "was not aiding and abetting the sale of rock cocaine but was merely purchasing and possessing it for his personal use," and thus, that the court should have given the proffered instruction. He notes he did not approach Scott or Blay, he undertook all of the risk in connection with the purchase, and he did not even gain any benefit (such as a piece of the rock) following the sale.

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[2] The language of the information charging defendant under section 11352(a) alleged defendant "did willfully and unlawfully sell a controlled substance, to wit, cocaine base."

In support of this contention, defendant relies on *People v. Label* (1974) 43 Cal.App.3d 766, 770, where it was stated that a purchaser of narcotics is not an accomplice to the seller as to either illegal possession or sale, and *People v. Edwards* (1985) 39 Cal.3d 107, where the defendant was charged with murder after his girlfriend died following an accidental overdose on heroin they had purchased for both of them using money from a common fund. In the latter case, the court stated: "The distinction drawn . . . between one who sells or furnishes heroin and one who simply participates in a group purchase seems to us a valid one, at least where the individuals involved are truly 'equal partners' in the purchase and the purchase is made strictly for each individual's personal use. Under such circumstances, it cannot reasonably be said that each individual has 'supplied' heroin to the others." *(Id.* at pp. 113-114.) These cases are distinguishable (and defendant's argument fails) because the evidence discloses that defendant agreed to obtain drugs for Scott in exchange for a piece of the cocaine for himself, as defendant himself concedes. Defendant (through Blay) furnished Scott with the rock cocaine with the expectation he would be paid for his efforts, and Scott indicated defendant's payment should come from Blay's chip off the rock. This was sufficient consideration to support a conviction for sale of rock cocaine. (*People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845-1846.)

The $20 bill Scott handed to Blay was not a common fund under any view of the evidence. It was payment for narcotics

that defendant (through Blay) would furnish to Scott in exchange for payment of a portion of the narcotic. It follows that the court did not err in refusing to give the jury defendant's proffered instruction. (*People v. Wilson* (1992) 3 Cal.4th 926, 941-942 [no duty to instruct on lesser offense unsupported by the evidence].)

DISPOSITION

The judgment is affirmed.

RAYE, Acting P.J.

We concur:

MORRISON, J.

HULL, J.